No. 08-1222

In The Supreme Court of the United States

BOY SCOUTS OF AMERICA;
SAN DIEGO-IMPERIAL COUNCIL,
BOY SCOUTS OF AMERICA,

Petitioners,

v.

LORI & LYNN BARNES-WALLACE;
MITCHELL BARNES-WALLACE; MICHAEL
& VALERIE BREEN; MAXWELL BREEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN LEGION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Chartered by Congress in 1919, The American Legion is a community service organization representing approximately 2.6 million members, men and women – plus an Auxiliary of almost 1 million members – in nearly 14,300 American Legion Posts throughout the United States, its territories and 20 foreign countries, including England, Australia, Germany, Mexico and the Philippines. Since its inception, The American Legion has maintained an ongoing concern and commitment to veterans and their families. The Legion helps military veterans survive economic hardship and secure government benefits. It drafted and obtained passage of the first G.I. Bill and its members were among the primary contributors to the Vietnam Veterans Memorial. It works to promote social stability and well-being for those that have honorably served our nation's common defense. And it strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state and national veterans memorials.

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[1] All counsel of record received notice of Amicus' intent to file this brief at least ten days before this brief was due and consented to the filing of this brief. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than Amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

Like Petitioners, the Legion is a private organization that requires its members meet certain criteria for membership, most notably that of service in the armed forces. Like Petitioners, the Legion has a reference to deity in its preamble. And like Petitioners, the Legion enters into lease and other legal agreements with various governments to carry out its programs and objectives. The Legion's very national headquarters, located in Indianapolis, is leased from the State of Indiana. Due to its membership requirements and other viewpoints it holds, under the Ninth Circuit's precedent the Legion fears exclusion from these various lease agreements and discrimination by government in any other endeavors.

The Legion also works extensively with the young people of the nation, offering numerous youth programs designed to develop lasting character and promote achievement in the coming generation. These programs include Boys Nation, Boys State, National Oratorical Contest, The American Legion Legacy Scholarship, and American Legion Baseball. In keeping with this dedication to the nation's youth, the Legion also sponsors thousands of Boy Scouts troops nationwide. The proper resolution of this case is a matter of great concern to the Legion as failure to reverse the court of appeals will have a detrimental effect on the ability of the Boy Scouts troops it sponsors to serve the nation's youth and continue as a force for positive character development where it is often severely lacking.

SUMMARY OF THE ARGUMENT

To have standing in the Ninth Circuit under the Establishment Clause, a plaintiff now need only disagree with the viewpoint of a private party lessee of government property and claim a self-imposed personal boycott of the property based entirely upon the lessee's viewpoint. Under this precedent "almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court." *Barnes-Wallace v. Boy Scouts of America*, 551 F.3d 891, 892 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of rehearing en banc) [hereinafter *Barnes-Wallace III*] [Pet. App. at 4a]. Worse, a plaintiff need not request a lawful remedy: a plaintiff can now seek and obtain a court order that requires a government to engage in blatant unlawful viewpoint discrimination. Viewpoint discrimination is the new law. Any group with an unpopular religious viewpoint must now brace itself for a heckler's blitz of meritless litigation initiated for the sole purpose to punish and chill the exercise of First Amendment rights. Under this precedent the many Boy Scouts' activities and services that make similar use of government property are effectively at an end, along with those of any other group with a viewpoint with which some citizen disagrees. This is the very type of government abuse the First Amendment was designed to prevent. The Court should grant certiorari and reverse the Ninth Circuit's holding on standing.

ARGUMENT

When pursuing a claim under the Establishment Clause, as with any other claim for relief, a plaintiff must plead and prove standing to do so. As this Court has explained, the "irreducible constitutional minimum" of standing has three essential components that must be proved: an "injury in fact," a "causal connection between the injury and the conduct complained of," and the "likel[ihood]" that the alleged injury will be "redressed" by a decision favorable to the plaintiff. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A more general statement of the same standard is that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

In its certification order the Ninth Circuit held that plaintiffs-respondents "have standing to pursue their claims because uncontroverted evidence shows that they suffered injury-in-fact traceable to the *Scout* defendants' conduct, and that a favorable decision is likely to redress their injuries." *Barnes-Wallace v. Boy Scouts of America*, 530 F.3d 776, 784 (9th Cir. 2008) (emphasis added) [hereinafter *Barnes-Wallace II*] [Pet. App. at 32a]. The court then identified two injuries suffered by plaintiffs-respondents. The first was "emotional harm," garnered from the alleged "religious display" cases. *Id.* at 784-85 [Pet. App. at 33a, 35a]. According to the court, this injury – "stronger" than those from its alleged religious

display cases – was inflicted upon plaintiffs-respondents by their personal choice to avoid Camp Balboa and the Aquatics Center due to their personal "object[ion] to the Boy Scouts' presence on, and control of, the land." *Id.* at 784 [Pet. App. at 33a-34a]. The second injury indentified by the court was a "loss of recreational enjoyment," garnered not from any Establishment Clause jurisprudence or even that of the First Amendment but from the court's own "environmental cases [in which] plaintiffs' enjoyment of land would suffer because of treatment of the land or events occurring on the land." *Id.* at 785 [Pet. App. at 34a-35a]. Other than the conclusory statement that plaintiffs-respondents have sustained such an injury, the court's only explanation for this finding is plaintiffs'-respondents' personal choice not to make use of Camp Balboa and the Aquatics Center while they are managed by an organization which has beliefs and viewpoints with which plaintiffs-respondents disagree. *Id.* [Pet. App. at 34a].

These injuries were held to stem not from any government activity nor that of a state actor, nor even from the Boy Scouts' actual management of the facilities, but from plaintiffs'-respondents' personal aversion to the very presence of the Boy Scouts due to its personal viewpoints. *Barnes-Wallace II*, 530 F.3d at 782-83, 784 [Pet. App. at 27a, 32a]. To cap off this extraordinary analysis the court held that the relief sought by plaintiffs-respondents – to enjoin the government from leasing to a private entity based solely on the entity's viewpoint – is an acceptable

remedy likely to redress the injuries identified. *Id.* at 783, 784 [Pet. App. at 30a, 32a].

I. Whether Individuals Have Standing To Sue The Government For Leasing Property To A Private Group With Whose Viewpoints The Individuals Disagree Is An Important Question This Court Should Resolve.

With respect to standing, Establishment Clause jurisprudence has recognized two unique classes of plaintiffs found nowhere else in the landscape of Article III. One is that of the taxpayer seeking to enjoin unconstitutional government expenditures. While for any other claim a plaintiff's status as a taxpayer is of no avail to his efforts to prove standing, *Frothingham v. Mellon*, 262 U.S. 447 (1923), a taxpayer may bring suit under the Establishment Clause to contest allegedly violative spending by the legislature. *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 127 S. Ct. 2562 (2007); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Flast v. Cohen*, 392 U.S. 83 (1968). The second is loosely coined the offended observer. The offended observer, though a somewhat nebulous litigant, is generally one who comes in contact with a display of some alleged religious significance on government property and feels the display is an attempt by that government to establish a religion. While mere disagreement with government decisions in any other context is

impotent to prove standing, *Mellon*, 262 U.S. at 488 ("We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional."); *Hein*, 551 U.S. at ___, 127 S. Ct. at 2562 ("The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution."), such a plaintiff may nonetheless bring suit under the Establishment Clause to enjoin allegedly unconstitutional activity by the respective government. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU*, 545 U.S. 844 (2005).

The Ninth Circuit has long struggled to protect the western states from the remotest possibility that an establishment of religion could be suspected within its jurisdiction, an effort from which even long standing memorials to the nation's war dead are not sacred. *See, e.g., Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), amended by 527 F.3d 758 (9th Cir. 2008). As a continuation of this effort the Ninth Circuit has now added a third member to the Establishment Clause's unique theories of standing. Faced with a record devoid of tax expenditures, an observer, an alleged religious act or display of any kind, or government action other than a common municipal lease, the court was able to see past its earlier rejection of this very theory and recognize yet another exception to standing under the Establishment Clause. *See Barnes-Wallace v. Boy Scouts of America*, 471 F.3d 1038, 1045-46 (9th Cir. 2006) (rejecting plaintiffs'-respondents' "purposeful avoidance" theory

as insufficient to prove standing) [hereinafter *Barnes-Wallace I*] [Pet. App. at 85a-86a]. Though more ethereal than either of its companions and somewhat defiant of clear definition, this new convert to Establishment Clause jurisprudence could rightly be identified as the potentially offended non-observer.

This new theory of standing is novel. As Judge O'Scannlain observed, "[t]he panel majority's certification order treats standing as a nuisance to be swatted aside rather than as an essential and *unchanging* part of the case-or-controversy requirement of Article III." *Barnes-Wallace III*, 551 F.3d at 898 (O'Scannlain, J., dissenting from denial of rehearing en banc) (quoting *Lujan*, 504 U.S. at 560) (emphasis added) (internal quotation marks omitted) [Pet. App. at 17a]. To prove standing under the Establishment Clause a litigant now needs only disdain for the viewpoint and presence of a private party lessee and claim to avoid the property because of the lessee. No doubt private groups with similar municipal lease agreements and potentially more "injurious" viewpoints, such as the Point Loma Community Presbyterian Church, are watching this litigation with great interest. [SER 28].

Of such resilience is this new theory that it is impervious to even basic requirements of constitutional litigation. The Ninth Circuit found plaintiffs-respondents have Establishment Clause standing based on the Boy Scouts' membership policy regarding sexual behavior. The court fails, however, even to attempt to tie the policy to any religious

practice, belief or tenet whatsoever. Certainly "[e]xclusion from something else entirely," such as membership in an organization, "does not confer standing to challenge any relationship the government has with the organization." *Barnes-Wallace II*, 530 F.3d at 798 n.27 (Kleinfeld, J., dissenting) [Pet. App. at 67a n.27]. It is similarly well established and obvious precedent that the First Amendment, to include the Establishment Clause, operates to restrict only government activity and not that of private entities. *Public Utilities Commission v. Pollak*, 343 U.S. 451, 461 (1952). The government, however, is conspicuously absent from the conduct upon which the Ninth Circuit bases its holding. The entire analysis focuses not on any government action but on "the Scout defendants' conduct," *Barnes-Wallace II*, 530 F.3d at 784 [Pet. App. at 32a], and defines "conduct" as the Boy Scouts' private viewpoints and membership requirements. Not even the Boy Scouts' management of either facility is at issue.

There is, of course, "a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion," which the First Amendment protects. *Bd. of Education of the Westside Community Sch. v. Mergens*, 496 U.S. 226, 250 (1990). All speech and expression at issue here is, by the Ninth Circuit's own admission, that of "the Scout defendant[s]." *Barnes-Wallace II*, 530 F.3d at 784 [Pet. App. at 32a]. There is no other reasonable conclusion. The Boy

Scouts alone "occup[ies] and control[s]" and exercises "dominion" over each of the properties. *Id.* at 782, 784 [Pet. App. at 29a, 32a]. Other than ownership, the City has no control over either the camp or aquatics center. In short, any reasonable observer would attribute to the Boy Scouts itself, and not to the City, any action or expression by the Scouts.

That leaves plaintiffs-appellants with little about which to complain. There is no standing to sue a government for what private expressive activity it allows on its property whether by visitor, taxpayer or lessee. Not only is government free to allow such private expression, it is unlawful for government to discriminate against it based on viewpoint. *See* Section II, *infra*. The Ninth Circuit nonetheless seeks to award a giant heckler's veto to those that oppose the private viewpoints of particular groups and associations and, in this case, effectively end the many Boy Scouts activities and services that make similar use of government property. This is the very type of government abuse the First Amendment was enacted to prevent. The Ninth Circuit's holding on standing should be reversed.

II. The Remedy Sought By Plaintiffs-Respondents Is Unlawful.

Standing requires that a plaintiff's alleged injury be redressable by a court of law; that is, it must be "likely to be redressed by the requested relief." *Cuno*, 547 U.S. at 342. Implicit in this requirement is that

the relief requested by the plaintiff be lawful. A court of law cannot grant a litigant unlawful relief. If the relief sought by a plaintiff is unlawful, the plaintiff's alleged injury it is not merely "[un]likely" to be redressed by court action but redressability is rendered legally impossible. If the alleged injury, then, cannot be redressed by the requested relief the plaintiff fails to prove standing. *See id.*

Plaintiffs-respondents sought and the district court granted an injunction of the Balboa Park and Fiesta Island leases. *Barnes-Wallace II*, 530 F.3d at 783 [Pet. App. at 30a]. The basis for their "injuries" is their desire, should they ever choose to visit Camp Balboa or the Aquatics Center, to have no contact with the Boy Scouts due to their disapproval of the Boy Scouts' membership standards and religious viewpoint. *Id.* at 784-85 [Pet. App. at 32a-34a]. The Ninth Circuit found that "[t]hese injuries . . . are likely to be redressed by a favorable decision," i.e., a decision affirming the injunction of the Balboa Park and Fiesta Island leases. *Id.* at 785 [Pet. App. at 35a]. Thus, according to the Ninth Circuit it is within the authority of the federal courts to prohibit a government from leasing property to a private entity based on the entity's viewpoint and exercise of freedom of association.

"That is an unprecedented theory" that "splits standing law at the seams." *Barnes-Wallace III*, 551 F.3d at 894 (O'Scannlain, J., dissenting from denial of rehearing en banc) [Pet. App. at 8a]. The unlawfulness of a government engaging in viewpoint

discrimination against a private entity is so well established as to be a foregone conclusion. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226; *Cornelius v. NAACP*, 473 U.S. 788 (1985); *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Widmar v. Vincent*, 454 U.S. 263 (1981). It is so well established that any government official engaging in such discrimination could well lose the protection of qualified immunity and be held personally liable to suit by the private entity discriminated against. *See Hope v. Pelzer*, 536 U.S. 730 (2002). The Ninth Circuit has nonetheless affirmed that a litigant's request that a court order a government to engage in blatant unlawful viewpoint discrimination is a valid and redressable request for relief. In its fervor to enforce one enumerated First Amendment protection the Ninth Circuit has trampled on another.

Like discrimination based on an expressed religious viewpoint, discriminating against a group's exercise of associational freedom is viewpoint discrimination as an expressive association is defined by the particular viewpoints it expresses. *Boy Scouts of America v. Dale*, 530 U.S. 640, 655 (2000) ("An association must merely engage in expressive activity that could be impaired in order to be entitled to protection."). This Court previously determined that the Boy Scouts is an expressive association and

upheld its membership policy under the protections of the First Amendment. *Dale*, 530 U.S. 640. Accordingly, as with any expressive association, the Boy Scouts cannot be forced to lay open its membership rolls to all comers or be penalized for not doing so. *Id.* at 648 ("freedom of association . . . plainly presupposes a freedom not to associate"). Such liberty is at the very heart of freedom of association. *Id.* ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, freedom of association . . . plainly presupposes a freedom not to associate.") (internal quotation marks omitted).

This Court has recognized that "[g]overnment actions that may unconstitutionally burden this freedom may take many forms." *Dale*, 530 U.S. at 648. Likewise, "[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment." *Id.* at 658 (quoting *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)). Surely it is just such a burden and impediment to force an organization to forgo its associational freedom simply to enjoy the equal protection of the law and be free from unlawful discrimination or to punish it for not doing so. It would be a violation of the First Amendment for the City, of its own accord, to exclude the Boy Scouts from a lease because of the viewpoint expressed by the Boy Scouts. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394 ("the government violates the First Amendment when it denies access [to government property] to a

speaker solely to suppress the point of view he espouses on an otherwise includible subject") (quoting *Cornelius*, 473 U.S. at 806); *Lamb's Chapel,* 508 U.S. at 394 ("The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (quoting *Vincent*, 466 U.S. at 804). It is no less a violation for a federal court to order such unlawful discrimination.

It is clear that the Ninth Circuit disagrees with the viewpoint and membership policy of the Boy Scouts, repeatedly referring to them as "demeaning," "derogatory," "denigrat[ing]," a "symbol[ ] of exclusion," and akin to the "Jim Crow South." *Barnes-Wallace II*, 530 F.3d at 786 n.6, 787 [Pet. App. at 37a n.6, 39a]; *id.* at 790-91, 792 n.3 (Berzon, J., concurring) (emphasis removed) [Pet. App. at 48a-49a, 50a, 53a n.3]. Notwithstanding the incredulity with which Amicus, which sponsors thousands of Boy Scouts troops nationwide, greets such malicious accusations leveled against an organization whose character and benevolence has earned worldwide acclaim, these same accusations coming from a neutral court of law only accentuate the Ninth Circuit's error. It is well established that the law "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Dale*, 530 U.S. at 661 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995)). Accordingly, "it is not the

role of the courts to reject a group's expressed values because they disagree with those values." *Dale*, 530 U.S. at 651. The Ninth Circuit may not grant standing where it is otherwise lacking in order to interfere with a defendant's speech and expressive association no matter how "enlightened either [party] may strike the government." *Id.* at 661. It was the very "Founders of this Nation" who "eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Dale*, 530 U.S. at 660-61 (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)). This guarantee restrains the judiciary no less than the legislature and executive.

Standing requires plaintiffs-respondents plead a redressable grievance. The relief sought by plaintiffs-respondents is unlawful viewpoint discrimination and thus incapable of supporting their attempt to establish standing.

III. The Boy Scouts Deserves The Equal Protection Of The Law.

The Boy Scouts has been positively impacting the young men of this nation since before the First World War. As of 2007 over 2.8 million boys were growing and developing as part of its many programs designed to "build character, to train in the responsibilities of participating citizenship, and to develop personal

fitness." Over 100 million boys have passed through its ranks.[2] The training and skills offered by its 120 separate merit badges range from Citizenship in the World to Environmental Science, from Personal Management to Emergency Preparedness, from First Aid to Personal Fitness. So distinguished is its highest achievement of Eagle Scout that only five percent of its members have ever attained it. These include notable leaders in all sectors of the culture, including Michael Bloomberg, Mayor of New York City; Michael Moore, Academy Award-winning documentary filmmaker; H. Ross Perot, founder of Perot Systems Corp. and former presidential candidate; Willie Banks, U.S. Olympic medalist and former world record holder in the triple jump; George Meyer, writer and producer of "The Simpsons;" and Neil Armstrong, the first man on the moon.[3]

Like the Boy Scouts, Amicus is a private organization chartered by Congress that requires its members meet certain criteria for membership, most notably that of service in the armed forces. Like the

[2] *BSA at a Glance*, fact sheet, www.scouting.org/Media/FactSheets/02-501.aspx (last visited April 29, 2009).

[3] *Eagle Scouts*, fact sheet, www.scouting.org/Media/FactSheets/02-516.aspx (last visited April 23, 2009). This distinguished list also includes The Honorable Stephen Breyer, Associate Justice, Supreme Court of the United States; The Honorable Gerald R. Ford, former President of the United States; Steve Fossett, world renowned businessman and adventurer; Steven Spielberg, Academy Award-winning film director; and J. Willard Marriott Jr., CEO of Marriott International. *Id.*

Boy Scouts, Amicus has a reference to deity in its preamble.[4] Like the Boy Scouts, Amicus engages in numerous youth oriented programs, such as Boys State, Boys Nation, National Oratorical Contest, American Legion Baseball, and sponsors thousands of Boy Scouts troops across the nation. And like the Boy Scouts, Amicus enters in to lease and other legal agreements with various governments to carry out its programs and objectives.[5] Under the Ninth Circuit's ruling and due to those who disagree with its private viewpoints and/or membership requirements, Amicus fears exclusion from these various lease agreements and discrimination by government in any other endeavors.

It appears the Ninth Circuit is redefining standing in such a way that "splits standing law at the seams." *Barnes-Wallace III*, 551 F.3d at 894 (O'Scannlain, J., dissenting from denial of rehearing en banc)

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[4] "For God and Country we associate ourselves together for the following purposes: To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one hundred percent Americanism; to preserve the memories and incidents of our associations in the Great Wars; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and goodwill on earth; to safeguard and transmit to posterity the principles of justice, freedom and democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness."

[5] In fact, the national headquarters of The American Legion located in Indianapolis, IN, is leased from the State of Indiana.

[Pet. App. at 8a]. Unless reversed, this ruling leaves Amicus and any other private group vulnerable to the threat of litigation for nothing more than engaging in free speech and expressive association with which another disagrees. Any group with a viewpoint or associational requirements unpopular with anyone else with the resources to file suit must now brace itself for the difficulty and expense of a heckler's blitz of meritless litigation initiated for the sole purpose to punish and chill the exercise of First Amendment rights – with no less than the express approval of a federal court of appeals.

In the present circumstance, failure to grant certiorari and reverse the Ninth Circuit's grant of standing to plaintiffs-respondents is to "assist in a campaign to destroy by litigation an association of people because of their viewpoints." *Barnes-Wallace II*, 530 F.3d at 798 (Kleinfeld, J., dissenting) [Pet. App. at 67a]. Such blatant and determined error by a court of appeals "threatens all our liberties." *Id.* at 799 (Kleinfeld, J., dissenting) [Pet. App. at 68a].

CONCLUSION

The Court should grant the petition for certiorari and reverse the Ninth Circuit's finding that plaintiffs-respondents have sustained their burden to prove standing.

Respectfully submitted,

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